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No. 01-0381

Supreme Court, U.S.
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In The

Supreme Court of the United States

PENOBSCOT NATION; PASSAMAQUODDY TRIBE; BARRY L. DANA, in his capacity as Chief of the Penobscot Nation; RICHARD M. DOYLE, in his capacity as Governor of the Passamaquoddy Tribe; and RICHARD STEVENS, in his capacity as Governor of the Passamaquoddy Tribe,

Petitioners,

v.

GREAT NORTHERN PAPER, INC.; GEORGIA-PACIFIC CORPORATION; INTERNATIONAL PAPER COMPANY; and the STATE OF MAINE,

Respondents.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

REPLY BRIEF

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REPLY BRIEF

1. Respondents' briefs in opposition hinge on the proposition that the decisions below raise no question of reservation entry and that the Petition mischaracterizes the record to make out a claim of significance. Petitioners and their counsel take Respondents' charges of misrepresentation very seriously. Such charges should never be made lightly. They certainly should not be made, as they are here, in a transparent effort to camouflage the significance of this case.

Respondent Corporations brought this action to enforce section 408 of the MAA, which provides that "every person shall have the right *to inspect and copy* any public record *during the regular business hours of the custodian or location of such record.*" State App. at 1 (emphasis added). Their Complaint specifically sought an order entitling them to "inspect and copy" records "in the custody" of the Tribes, R.No. 2 at 4, and they won an order from the Maine Superior Court, requiring Petitioners to "turn over" the records. App. 76.

The Corporations have stated unequivocally that this order gives them exactly what they sought – the right to enter the Tribes' reservations to inspect their records. After Petitioners refused to comply with the order, the Corporations moved for contempt, telling the Superior Court that "the terms of the document production . . . *ha[ve] already been established by statute and this Court's Order.*" R.No. 76 at 5 n.2. They view those terms as admitting of no ambiguity:

> *The Penobscot Nation states that we will not be allowed onto Indian Island to review records. This position is unacceptable and not in compliance with the requirements of the [M]AA . . . Under the [M]AA, . . . we have a right to inspect all public records without the need to copy them. . . .* If we make our own photocopies, the only cost to the Tribes will be the cost of operating the Tribes' photocopiers.

Id. at 7 (emphasis added). This puts the lie to the Corporations' claim that they have "never sought . . . a mandate [of entry]." Corps. Opp. at 13; State Opp. at 14-15. Not only did they seek such a mandate, but they firmly believe that in the Superior Court's order, they have one. Now, in the face of

the Tribes' Petition, the Corporations attempt to recharacterize what is *"established by"* the statute and court order by quoting the decision of Maine Supreme Judicial Court (MSJC) out of context to suggest that the Tribes need only produce "copies" of documents. Corps. Opp. at 15. The MSJC's decision, however, not only concluded that the Corporations may enforce section 408 against the Tribes, but it affirmed the very order they have already said mandates their entry into the reservation offices; albeit with modifications as to the scope of tribal records (those pertaining to tribal council meetings) that Respondents have a right to inspect. *See* App. at 32-33.

The Corporations' reasons for trying to camouflage the specter of reservation entry are obvious. They understand, as the Petition documents, that control over the public's entry into these Indian reservations goes to the heart of tribal existence, and it is hard to deny the significance of this case since they have secured an order mandating such entry. Accordingly, they now suggest both to the Superior Court and to this Court that the Tribes have an alternative to allowing them into their reservation offices. Petitioners, they claim, can comply with their demands by effectively acting as their agents and removing the contents of their offices to an off-reservation location, *see* Corps. Opp. at 6 n.4 (noting the Corporations' preference "to view them off-site"), and the Superior Court has incorporated that alternative into its most recent order, stating that, for so long as this Petition is pending, Petitioners will not be "required to produce any documents or to permit inspection and copying of any documents pursuant to [section 408]." Order, Me. Super. Ct., Docket No. CV-00-329, entered Oct. 3, 2001.

But let there be no mistake – Respondents' alternative is illusory. This is not ordinary "production." They would have Petitioners "make their computer hard drives available for inspection" somewhere off-reservation together with myriad files concerning natural resources, pre-copied in their entirety (a monumental task). *See Plaintiffs' Opposition to Defendants' Motion for Stay* at 15; Appendix G at 1, Me. Super. Ct., Docket No. CV-00-329, entered Aug. 15, 2001 ("Pls. Stay

Opp."). Petitioners simply cannot uproot their reservation offices and move them to another location for Respondents to peruse. Whether the Corporations enter the reservations at will "during regular business hours," or use that right to coerce the relocation of the Tribes' nerve centers to off-reservation sites, the disruption to the normal functioning of these small tribal governments would be intolerable. Absent intervention by this Court, the order of the Maine Superior Court, as affirmed by the MSJC, gives the Corporations a mandate to intrude upon the reservations, which is what they have sought all along.

2. Respondents do not even address Petitioners' argument that "[e]qually at stake [in this case] is the Tribes' interest in maintaining the integrity of their governmental authority by dealing with 'public access' [to documents] matters pursuant to their own policies, procedures, and customs." Pet. at 22. Their attempt to dodge this issue, however, simply highlights its importance. The assault upon tribal governmental prerogatives is very real. The Corporations have persuaded the MSJC to deem the Tribes "municipalities" in their "agreements with federal government agencies that relate to the protection or study of water or other natural resources," App. at 32, and demanded access to every scrap of paper and e-mail "related in any way to" any such agreements going to the heart of the Tribes' existence *as Tribes*. R.No. 2, Ex. A.[1] They even take the position that

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[1] Pursuant to Congress' directive, 25 U.S.C. § 1724(h), the Tribes manage and administer "land or natural resources" within their respective Indian territories in accordance with agreements with the Secretary of the Interior pursuant to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450 *et. seq.* ("ISDA"), a statute which this Court says reflects "Congress' desire to promote the goal of *Indian self-government.*" *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991) (emphasis added). The Corporations' demands would encompass any ISDA contracts supporting the Tribes' regulation and exercise of their sustenance fishing rights, although Maine's Attorney General has said that this activity is within the Tribes' exclusive authority to

under the MSJC decision, the Tribes' communications *with each other* must be deemed those of "municipalities." Pls. Stay Opp. at 11. They therefore demand access to any communication between the Tribes (or their representatives) "that relate[s] in any way to the regulation of water resources." *Id.*; R.No. 2, Ex. A. It is threatened intrusions of this sort that make this case of fundamental importance to Petitioners' ability to maintain control over their own destiny in the face of those who would like to disrupt and destroy their governmental operations.[2]

3. Respondents also assert that the Petition is based on the "false premise" that the First Circuit and the MSJC are in conflict in their approach to the "internal tribal matters" provision that protects core attributes of Petitioners' sovereignty from State intrusion. Corps. Opp. at 21; State's Opp. at 16. With selected quotations from First Circuit decisions, Respondents simply restate what the Tribes have never disputed: (1) the degree of state authority over the Tribes in Maine is significant and unlike many other tribal-state relationships and (2) principles of federal Indian common law cannot thwart the specific provisions of the settlement acts. The profound differences between the First Circuit and the MSJC are not found with respect to these points but in the method of defining the scope of the "internal tribal matters" provision. By incorrectly suggesting that the MSJC relies upon federal Indian common law to define "internal tribal

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control, Op. Me. Att'y Gen. 88-2, and Congress has described it as an "expressly retained sovereign activit[y]." S. Rep. No. 96-957 at 15; H.R. Rep. No. 96-1353 at 15 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, 3791.

[2] What Petitioners are seeking from this Court, then, is most decidedly not an advisory opinion. Corps. Opp. at 16-17. That would only be true if the Corporations had abandoned their efforts to obtain tribal records under the MAA. Instead, the Corporations are very much seeking to enforce the decisions below in such a way as to destroy Petitioners' control over their reservations and tribal governmental records therein.

matters," Corps. Opp. at 19; State's Opp. at 16, Respondents try to gloss over these differences. Petitioners summarize:

While declaring that the scope of the Tribes' protected sovereignty is an "ambiguous," "murky," "unsettled" and "complex" problem, App. at 8-9, 26-27, 33 n.21, the MSJC refuses to resolve that problem using well-established guideposts of federal Indian law. It proclaims, "We . . . look not to federal common law to define 'internal tribal matters.' " *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489 (Me.), *appeal dismissed*, 464 U.S. 923 (1983); *see* App. at 8 (citing same). In the First Circuit, by contrast, the "prior legal understandings" of tribal sovereignty in federal Indian law "are particularly important" in determining the prohibition against state authority over "internal tribal matters" in Maine "because they inform the intent of Congress in the adoption of the Settlement Act." *Penobscot Nation v. Fellencer*, 164 F.3d 706, 712 (1st Cir.), *cert. denied*, 527 U.S. 1022 (1999). The MSJC recounts years of state domination to support a foundational premise that the Tribes had "no established tribal sovereignty" before the Settlement Act, App. at 10-11, whereas the First Circuit rests on the bedrock principle of federal Indian law that "[n]either the passage of time nor apparent assimilation of the Indians can be interpreted as diminishing or abandoning a tribe's status as a self governing entity." *Fellencer* at 709 (citation and quotations omitted). The MSJC analyzes the Tribes' "governmental status" as something they "gained" from Congress in the Settlement Act on a clean slate, *see* App. at 19, 24, whereas the First Circuit makes clear that Congress confirmed the Tribes' "inherent" preexisting attributes of sovereignty in accordance with its decision in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1978) – *see Fellencer* at 712 – which, in turn, admonished the State for advocating a "fundamentally misconceive[d]" notion that such attributes had to be "granted to the tribe by the federal government." *Bottomly* at 1065.

The MSJC concludes that Congress confirmed a "model" of "clarity" for state control over the Tribes under the municipal "duties and obligations" clause of 30 M.R.S.A. § 6206(1), App. at 19-20; that "in their capacities as the governments of

Indian territories in Maine," the Tribes' "governmental status" is that of a "municipality," App. at 24; and that they are, therefore, "subject to" state laws governing Maine's political subdivisions, *id.* Consistent with its rejection of federal Indian common law, it does not look to the Indian law precedents of this Court to decide whether a particular matter is protected from state control as an "internal tribal matter." App. at 27. The First Circuit, in contrast, construes the municipal "duties and obligations" provision in concert with the "internal tribal matters" prohibition in section 6206(1), employing the canon, "rooted in the unique trust relationship between the United States and the Indians," that provisions "diminishing the sovereign rights of Indian tribes" must be construed "strictly, with ambiguous provisions interpreted" in favor of the tribes in accordance with "traditional notions of sovereignty" and "tribal independence." *Fellencer* at 708-09. It recognizes that pursuant to the Settlement Act, the Petitioner Tribes, because of their separate sovereign status under the precedents of this Court, are not states or local governments under the United States Constitution, *Akins v. Penobscot Nation*, 130 F.3d 482, 486 (1st Cir. 1997) (citing 25 U.S.C. § 1725(h) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)) and that if any construction of the Maine Implementing Act conflicts with the federal Settlement Act, the latter controls. *Id.* at 485 n.4 (citing 25 U.S.C. § 1735(a)). Hence, in the First Circuit, in contrast to the MSJC, a "municipal model" *does not* define the status of the Tribes.[3]

Equally important, in the MSJC, the "internal tribal matters" provision is reduced to a mere defense to the merits

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[3] While certiorari briefing should not address the merits, Respondents' heavy reliance upon 25 U.S.C. § 1725(h), § 1735(b) and 30 M.R.S.A. § 6204 to anchor their "municipal model" deserves comment. None of these general provisions touch upon the extent to which Maine may impose laws applicable to its municipalities upon the Tribes. Indeed, not one can be applied in reference to the Petitioner Tribes without first construing the "internal tribal matters" provision in section 6206(1).

of actions presumed to proceed against the Tribes as they would against the State's political subdivisions, *see* App. at 20, 24, whereas in the First Circuit, it accords the Tribes immunity from "state court jurisdiction," *see Fellencer* at 713. The Tribes have maintained that the state courts lack jurisdiction to proceed with the Corporations' MAA action because they are immune from such actions. *See* App. at 44, 80, 108. But the state courts have failed to entertain this jurisdictional claim (*see* Petition at 16 n.9, 20 n.11) precisely because under their "municipal model" it is not cognizable. This is not a trivial distinction. The Tribes' sovereign immunity entitles them to be free from the very exercise of state court jurisdiction because of their status as *tribal* governments. *See Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-73 (1977). Such immunity is "effectively lost if a case is erroneously permitted" to proceed on the merits. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Moreover, any such waiver must be *unequivocally* expressed by the Tribes or by Congress. *Oklahoma Tax Comm'n*, 498 U.S. at 909.[4] Yet under

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[4] Congress waived the Tribes' inherent sovereign immunity from suit, an immunity that had been confirmed prior to the Settlement Act in *Bottomly*, in 25 U.S.C. § 1725(d)(1), with the necessary understanding that the waiver was "subject to the limitation on internal affairs contained in Sec. 6206(1)" of the Maine Implementing Act. H.R. Rep. No. 96-1353 at 19, *reprinted in* 1980 U.S.C.C.A.N. 3786, 3795; S. Rep. No. 96-957 at 19. Thus, while 30 M.R.S.A. § 6206(2) exposes the Tribes to tort and contract liabilities on the same terms as municipalities in Maine, § 6206(1) preserves their immunity from state court actions infringing upon "internal tribal matters." *See Fellencer* at 713. In this vein, the Corporations' suggestion that they could never obtain civil discovery if the Tribes controlled "public access" rights is a red herring. The Tribes have never contended that they are not subject to civil discovery in actions for which Congress expressly waived their sovereign immunity from suit. The Corporations' MAA case, however, is not such an action. The Corporations concerns about accessing tribal regulations likewise are of no moment. Were the Tribes to regulate the Corporations (and they are not), there would be no barrier to

the MSJC ruling, the Tribes can raise the "internal tribal matters" provision only as a defense *to the merits* of the Corporations' action, and the state courts will "draw lines" (just as the Corporations say) *about the tribal records to be inspected* in light of their presumed authority over the Tribes "as municipalities." In the First Circuit, where the "internal tribal matters" provision is understood as a barrier to the courts' power to proceed, things are very different. *See Akins*, 130 F.3d at 489 (court must be "hesitant" to assert "jurisdiction where it appears that . . . that inherent self-governing authority of a tribe is involved").[5]

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their obtaining tribal laws. Indeed, the due process provisions of the Indian Civil Rights Act, 25 U.S.C. § 1302(8), would require it.

[5] Respondents seek to characterize the Tribes as rogue litigants for "openly defying" the state court's MAA enforcement order of September 19, 2000 by "neither complying with it nor appealing from it," and for seeking to enjoin the state court judge in federal court for proceeding against the Tribes without jurisdiction. *See* Corps. Opp. at 9-10; State's Opp. at 10-11. However, the Superior Court originally gave Petitioners no choice but to either grant the Corporations' MAA access demands or to appeal its order *on the merits*. *See* Order dated Oct. 20, 2000 (Corps. App. at 20), Order dated Sept. 19, 2000 (Pet. App. at 76). It was only the court's November 9 order (Corps. App. at 27), issued *after* the contempt proceedings, that allowed the Tribes to bring a narrow appeal *on the jurisdictional issue*. *See* Notice of Appeal (Corps. App. at 28-29). There was no blameworthy "defiance" by the Tribes. Indeed, a Court that leapfrogs issues of subject matter jurisdiction and proceeds to the merits acts "beyond the bounds of authorized judicial action." *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998); *Hutchins v. Hutchins*, 136 Me. 513 (1939). Respondents disdain the Tribes for seeking to enjoin the state judge from imposing the MAA upon them on the ground that he lacked jurisdictional authority. Corps. Opp. at 10; State's Opp. at 11. It surely comes as no surprise to this Court, however, that such actions are commonplace in Indian affairs. *See, e.g., Bowen v. Doyle*, 230 F.3d 525 (2nd Cir. 2000); *Sac and Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995). Indeed, the reciprocal situation, where non-Indians have sought injunctions

In sum, this case presents an important opportunity for this Court to resolve fundamental differences in the approaches of the First Circuit and the MSJC to state power over the Petitioners and their very status as Indian tribes.[6]

4. The State's argument that the writ should be denied because the questions are not of "nationwide impact," State Opp. at 14-15, misunderstands the Rule 12(c) requirement that a petition present "an important question of federal law." First, this Court has not infrequently issued the writ in cases affecting tribal rights in only a particular State or region of the country, because of the great importance of those cases to Indians and non-Indians alike in the affected area. *See, e.g, Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). This is such a case.[7] Second,

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against tribal court judges, has generated some of the more significant cases in the field. *See, e.g., A-1 Contractors v. Strate*, 520 U.S. 438 (1997); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985).

[6] Respondents seek to transform the First Circuit's holding that the principles of *res judicata* barred independent federal examination of the issues decided by the Maine state courts into agreement with those holdings. Corps. Opp. at 21; State's Opp. at 17. The First Circuit, of course, said no such thing: its point was that the lower federal courts could not examine Petitioners' claims, when the state courts had engaged in that process. In taking that position, Chief Judge Boudin was careful to note that this Court might ultimately review the issues decided below. *Penobscot Nation v. Georgia-Pacific Corp.*, 254 F.3d 317, 324 (1st Cir. 2001).

[7] Respondents also suggest, by reference to this Court's dismissal of the *Stilphen* appeal, that a substantial federal question may not be presented. They are misguided. It is "hornbook law" that this Court's former procedure of dismissing direct appeals from state courts "for want of a substantial federal question" cannot be understood as a determination that an important federal question was not presented. *See generally* 16B C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* § 4014 (2d ed. 1996). Surely the mere fact that the Court did not review *Stilphen* does not mean that

the most paramount of federal interests are at stake. Where tribal immunity is present, "[p]ublic policy forbids the suit," *United States v. United States Fidelity & Guarantee Co.*, 309 U.S. 506, 514 (1940), and the force of that public policy "is not subject to diminution by the States," *see Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 756 (1998). Moreover, "exacting scrutiny" is called for in this case because of the "powerful federal interest in safeguarding [Indian] rights from state encroachment." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983). Were it otherwise, the "undermining or destruction of . . . tribal governments," could be left unchecked. *See Bryan v. Itasca County*, 426 U.S. 373, 388 (1976).

For these reasons, as well as for those set forth in the Petition, the writ should issue.

Respectfully submitted,

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review *in this case* is unwarranted. *See U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18, 24 (1994) (noting the Court's "customary skepticism toward *per curiam* dispositions that lack the reasoned consideration of a full opinion"). And it cannot be seriously contended that the scope of state power over the Tribes granted by Congress upon compromising the Tribes' historic land claims against Maine, *and in the exercise of Congress's constitutional plenary authority over Indian affairs*, does not present a federal question. Simply put, Congress' ratification of the Maine Implementing Act made such issues federal questions. *See Grayson v. Harris*, 279 U.S. 300, 303 (1929). *Cf. State v. Sims*, 341 U.S. 22, 28 (1950) ("a State cannot be its own ultimate judge in a controversy with a sister State.").